Office-Supreme Court, U.S.
FILED
SEP 10 1966
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term A. D. 1966

Case No. 448

CITY OF MIAMI BEACH,
a municipal corporation, *Petitioner*,

vs.

HYMAN KIRSNER and IDA KIRSNER,
his wife, *Respondents*.

BRIEF OF RESPONDENTS

JOHN M. THOMSON
HOLLADAY & GARDNER
250 Bird Road
Post Office Box 340
Coral Gables 34, Florida

REVIEW PRINTING COMPANY — MIAMI, FLORIDA

CASES CITED

	Page
Adams v. Russell, 229 U.S. 353, 57 L.Ed. 1224, 33 Sup.Ct. 846	6
Allen v. Arquimbau, 198 U.S. 149, 49 L.Ed. 990, 25 Sup. Ct. 622	6
Bachtel v. Wilson, 204 U.S. 36, 51 L.Ed. 357, 27 Sup. Ct. 243	6
Booker v. Fidelity Trust Co., 261 U.S. 114, 67 L. Ed. 556, 43 Sup. Ct. 288	7
Bushnell v. Crooke Mining and Smelting Co., 148 U.S. 682, 37 L.Ed. 610, 13 Sup. Ct. 771	7
Citizens National Bank v. Durr, 257 U.S. 99, 66 L.Ed. 149, 42 Sup. Ct. 15	7
City Market Street Railway Co. v. Railway Commission of State of California, 324 U.S. 548, 89 L.Ed. 1171, 65 Sup. Ct. 770	9
Consolidated Turnpike Co. v. Norfolk and V. R. Co., 228 U.S. 326, 57 L.Ed. 857, 33 Sup. Ct. 310	7
Cuyahoga River Power Co. v. Northern Realty Co., 244 U.S. 300, 61 L.Ed. 1153, 37 Sup. Ct. 643	6
Durley v. Mayo, 351 U.S. 277, 100 L.Ed. 1178, 76 Sup. Ct. 806, rehearing denied 352 U.S. 859, 1 L.Ed. 2d 69, 77 Sup. Ct. 22	5
Godchaux Co. v. Estopinal, 251 U.S. 179, 64 L.Ed. 213, 40 Sup. Ct. 116	7
McCorquodale v. Texas, 211 U.S. 432, 53 L.Ed. 269, 29 Sup. Ct. 146	6
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 89 L.Ed. 2092, 65 Sup. Ct. 1475	5-6

TEXTS AND STATUTES

	Page
54 Am.Jur., United States Courts §217	6
Anno: 67 L.Ed. 557, 560	6
Constitution of the State of Florida, Article V §5(3)	9
Florida Appellate Rule 2.1a(5)(a)	9

IN THE SUPREME COURT OF THE UNITED STATES

October Term A. D. 1966

Case No. 448

CITY OF MIAMI BEACH,
a municipal corporation, *Petitioner*,

vs.

HYMAN KIRSNER and IDA KIRSNER,
his wife, *Respondents*.

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The decision of the Third District Court of Appeal in the case at bar provides a very concise statement of the case in its posture before that court. That decision entered August 10, 1965, is as follows:

"PER CURIAM.

The appellant, the city of Miami Beach who was the defendant below, has appealed from an adverse final decree. At suit of property owners residing on Star Island, a part of Miami Beach located in Biscayne Bay, the city was enjoined to discontinue its designated 100 x 100 foot dump area located in and on a 1,700 x 100 foot central

parkway area on the island, previously acquired by the city by a deed containing a restriction against its use for other than park purposes. The decree also directed removal of a hedge surrounding the dump area and that such area be landscaped in conformity to the remaining park area.

It was alleged and shown that although intended for dumping the trim (grass and shrubs) of Star Island residents, the dump area was so used by residents of other connected islands and included unsightly debris. There were allegations of resultant odors and attracted vermin. The chancellor held the allegations of the complaint were established and that plaintiffs were entitled to the relief sought; and that the restriction against use other than as a park was binding and the city's use of the dump area thereon was in violation of the restriction.

We have considered the several contentions presented by the appellant, including the argument that the decree was too broad, and we find them to be without merit. The record discloses sufficient evidentiary support for the findings and conclusions of the chancellor.

Affirmed."

Thereafter, the Florida Supreme Court denied the City's petition for a writ of certiorari by its order entered March 30, 1966. The City filed its petition for rehearing complaining that:

"1. The Court overlooked or failed to consider that the Decree of the Circuit Court, as affirmed by the Third District Court of Appeal, enjoins the City from using its own property for the lawful purpose of a temporary collecting point for tree trimmings and grass cuttings resulting from the City landscaping this identical property. The City is thus being deprived of its legal right to use said property for a lawful purpose in violation of the Fourteenth Amendment of the United States Constitution.

2. The Court overlooked or failed to consider that the Decree complained of, which requires the City to destroy the trees on its own property, is in direct conflict with the decision of this Honorable Court in the case of *In Re Seven Barrels of Wine*, 79 Fla. 1, 83 So 627, holding that a nuisance may be abated, but inoffensive private property may not be arbitrarily destroyed, and that such decree deprives the City of Miami Beach of its property without due process of law and in violation of the Fourteenth Amendment to the United States Constitution.

3. The Court overlooked or failed to consider that the Decree of the Circuit Court, as affirmed by the Third District Court of Appeal, is in direct conflict with the decision of this Court in *State ex rel Knight vs. City of Miami*, 53 So 2d 636.

4. The Court overlooked or failed to consider that the decision of the Circuit Court, as affirmed

by the Third District Court of Appeal, is in conflict with the decision of this Court in *Beckman vs. Marshall*, 85 So 2d 552, holding that 'trifling annoyance, inconvenience, or discomfort' is no basis for injunctive relief and that the law does not 'prohibit all use of one's property which annoys or disturbs his neighbor, but rather prohibits a use which constitutes injury to a legal right of the neighbor.'

5. The Court overlooked or failed to consider that the decision of the Circuit Court, as affirmed by the Third District Court of Appeal, is in conflict with the decision of this Court in *Beckman vs. Marshall*, 85 So 2d 552, which holds that the 'inquiry is whether the act or use was a reasonable exercise of the dominion, which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy.' The denial by the Circuit Court and the Third District Court of Appeal of the City's exercise of its dominion over its property in accordance with the standards so delineated deprives the City of its property rights in violation of the Fourteenth Amendment of the United States Constitution."

This petition marked the first time in the case that a Federal question was raised and even then the City suggested that the Florida Supreme Court had overlooked or failed to consider applicable Florida decisional law. The court denied this petition without opinion on May 17, 1966.

The Petitioner now seeks the jurisdiction of the United States Supreme Court for review of this case, praying for issuance of a writ of certiorari to the Supreme Court of the State of Florida; to the Third District Court of Appeal of Florida; and, to the Circuit Court of the Eleventh Judicial Circuit of the State of Florida.

ARGUMENT

The Petitioner acquired the city park, which is the subject matter of the case at bar, by a deed containing a restriction that it use the property "for park purposes only". The orders and judgments of the Florida state courts have merely ordered the City to use its property for park purposes only, as required in the deed. This requirement, according to the Petitioner, deprives it of the use of its property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The Respondents' argument will be limited to the applicable law relating to the court's jurisdiction under the Fourteenth Amendment as it is without question that the Fifth Amendment is obligatory only on the United States, and is applicable only in federal courts, not in state courts.

Generally, it is understood that a Federal question must be raised prior to the final decision of a state court, and that it is just too late when it is presented in a petition for rehearing before the highest state court, unless that court entertains the petition and expressly passes upon the Federal question raised. *Durley v. Mayo*, 351 U.S. 277, 100 L.Ed. 1178, 76 Sup.Ct. 806, rehearing denied 352 U.S. 859, 1 L.Ed.2d 69, 77 Sup.Ct. 22; *Radio*

Station WOW, Inc. v. Johnson, 326 U.S. 120, 89 L.Ed. 2092, 65 Sup.Ct. 1475; *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U.S. 300, 61 L.Ed. 1153, 37 Sup.Ct. 643; *Adams v. Russell*, 229 U.S. 353, 57 L.Ed. 1224, 33 Sup.Ct. 846; *Bachtel v. Wilson*, 204 U.S. 36, 51 L.Ed. 357, 27 Sup.Ct. 243; *Anno:* 67 L.Ed. 557, 560, *54 Am.Jur., United States Courts* §217.

In the case of *Allen v. Arquimbau*, 198 U.S. 149, 49 L.Ed. 990, 25 Sup.Ct. 622, a writ of error to the Supreme Court of Florida was dismissed as follows:

> "The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad; but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction. Dibble v. Bellingham Bay Land Co. 163 U.S. 63, 41 L.ed. 72, 16 Sup.Ct.Rep. 939; Klinger v. Missouri, 13 Wall 257, 20 L.ed. 636; Johnson v. Risk, 137 U.S. 300, 34 L.ed. 683, 11 Sup.Ct. Rep. 111."

It is evident that, before the jurisdiction of the United States Supreme Court over a state court can be sustained, it must appear from the record that the state court actually considered and passed upon the Federal question when it was first raised in the petition for a rehearing in the highest state court. In *McCorquodale v. Texas*, 211 U.S. 432, 53 L.Ed. 269, 29 Sup. Ct. 146, where a Federal

question was presented for the first time in the defendant's petition for a rehearing, the state court's order read:

> "This cause came on to be heard on appellant's motion for rehearing, and, the same being considered by the court, said motion is overruled."

In its review of the order, the United States Supreme Court said:

> " . . . this court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing, in the court of last resort of a state, after that court has pronounced its final decision. . . . It is true that we have also decided that if the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so."

There is nothing better settled than it is too late to raise a Federal question for the first time in a petition for a rehearing after the final judgment of the highest state court. This is especially true when the petition is denied without opinion. *Booker v. Fidelity Trust Co.*, 261 U.S. 114, 67 L.Ed. 556, 43 Sup.Ct. 288; *Citizens National Bank v. Durr*, 257 U.S. 99, 66 L.Ed. 149, 42 Sup.Ct. 15; *Godchaux Co. v. Estopinal*, 251 U.S. 179, 64 L.Ed. 213, 40 Sup.Ct. 116; *Consolidated Turnpike Co. v. Norfolk and V. R. Co.*, 228 U.S. 326, 57 L.Ed. 857, 33 Sup.Ct. 310; *Bushnell v. Crooke Mining and Smelting Co.*, 148 U.S. 682, 37 L.Ed. 610, 13 Sup.Ct. 771.

In the case at bar the Petitioner, like so many others in the cases cited by the Respondents, first deemed it advisable to raise a Federal question in its petition for rehearing before the Florida Supreme Court upon that court's denial of the Petitioner's writ of certiorari. This petition, in addition to the Federal question, suggested that the Florida Supreme Court "overlooked or failed to consider" several Florida cases which were claimed to be in conflict with the decision of the Circuit Court as affirmed by the Third District Court of Appeal.

Just as in the *Allen* case supra, and following closely the wording of the Texas court in *McCorquodale v. Texas* supra, the Florida Supreme Court denied the petition for rehearing without opinion. Thus, there is no way to determine whether or not the Federal question was considered by the court or the grounds for the court's order, other than the obvious observation that the Florida Supreme Court did not feel it had sufficient grounds to invoke its jurisdiction.

Applying the law to the facts of the case at bar is just like adding another carbon copy to the long line of decisional law on this subject. There has been no difficulty whatsoever in finding ample support for the Respondents' contention that the petition should be denied.

The Petitioner, of course, had the right to raise the Federal question in the Circuit Court and to require that court to rule upon the Federal question in its final decree. If the Petitioner had followed that procedure, it would have been allowed to appeal the final decree directly to

the Florida Supreme Court as a matter of right. *Constitution of the State of Florida, Article V §5(3).*[1]

Although this may have been the better procedure in the best interests of the Petitioner, a misapprehension by a litigant of the steps which its best interests required during a trial is not a ground for interference by a court as a denial of constitutional rights. *City Market Street Railway Co. v. Railway Commission of State of California*, 324 U.S. 548, 89 L.Ed. 1171, 65 Sup.Ct. 770. The legal impact that this case may have upon the City has not changed from the time it was first filed, yet the city did not raise a Federal question until the petition to the Florida Supreme Court for rehearing. The Florida Supreme Court without delay, entered its order denying the petition.

The City in its petition before this court states that, "the judicial decrees complained of confiscate and take away this park from the City without compensation." This is simply not true. This city park which is approximately 1,700 feet long and 100 feet wide continues to be owned by the City, subject to the restriction that it be used "for park purposes only" as required in the deed of conveyance to the City. The effect of the judicial decrees complained of is that the City will be required to remove the 100 x 100

---

[1]This section entitled, "Jurisdiction" provides that: Appeals from trial courts in each appellate district, . . . may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court." *Florida Appellate Rule 2.1a(5)(a)* provides that: "Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only . . . from final judgments or decrees . . . construing a controlling provision of the Florida or Federal Constitution, . . ."

foot dump that it has maintained in front of the Respondents' home. The City actually stands to gain by this, since, when the dump area is landscaped in conformity with the remainder of the park area, it will add to the beauty of Star Island.

The Respondents must also comment on the City's claim in its petition that, "the decree requires the City to perpetually expend money in the maintenance of the park in its present state for the benefit of a single individual." In the first place, the decree requires that the City change the present state of the park by removal of the dump and relandscaping of that area. Secondly, Star Island is a fully developed residential area of the very highest type having many valuable homes surrounding the park which is in the center of the island. It is obvious that the maintenance of the park is for the benefit of all the home owners on Star Island, as well as all of the citizens of the City of Miami Beach.

CONCLUSION

Under the circumstances presented in the case at bar, it is submitted that not only was the City too late by raising a Federal question for the first time in its petition for rehearing before the Florida Supreme Court, but that all of the fundamental principals of justice guaranteed by the Fourteenth Amendment of the United States Constitution have been amply bestowed upon the City so that now the Respondents are entitled to have the decrees enforced by the Florida courts. Therefore, the Respondents pray that the court deny the Petitioner's writ of certiorari.

Respectfully submitted,

John M. Thomson

JOHN M. THOMSON
HOLLADAY & GARDNER
250 Bird Road
Post Office Box 340
Coral Gables 34, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Brief of Respondents has been served by mail upon BURNETT ROTH, Attorney for Petitioner, 420 Lincoln Road, Miami Beach, Florida, this 8th day of September, 1966.

John M. Thomson